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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1031

WILBUR G. SIEVERMAN, as Administrator of the estate of HARRY L. SIEVERMAN,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement

The petitioner seeks a writ of certiorari to review the order of the Appellate Term of the Supreme Court of the State of New York, First Department, which by order entered November 26, 1963, affirmed a judgment of the Civil Court of the City of New York, dated August 7, 1963, which dismissed the complaint in this action.

The Appellate Term and the Appellate Division denied leave to appeal to the Appellate Division by orders entered November 26, 1963, and January 28, 1964, respectively.

The opinion of the Civil Court is unreported. It will be found at page 9a of the petition. No opinion was rendered by the Appellate Term in affirming the judgment of the Civil Court.

The action was brought to recover the alleged monetary value of unused vacation time which had accrued to peti-

tioner's intestate at the time of his death. The Civil Court dismissed the complaint with the statement that the deceased could not have demanded salary in lieu of vacation time during his lifetime and that there was no warrant for making any payment in lieu of such vacation time to the plaintiff administrator. The Appellate Term unanimously affirmed without opinion the judgment of the Civil Court. No opinions were rendered by the Appellate Term or the Appellate Division in denying leave to appeal.

Facts

The complaint alleges that Harry L. Silverman, deceased, was employed by the City of New York for more than fifty-one years until the time of his death.

Pursuant to leave regulations for New York City employees under the Career and Salary Plan, Harry Silverman, petitioner's intestate, had accumulated fifty-two days' leave at the time of his death. The approximate value of such leave is asserted to be $900. The petitioner, as administrator, seeks to recover that sum.

Upon petitioner's motion for summary judgment and respondent's cross-motion, the Civil Court denied petitioner's motion and granted summary judgment in favor of the respondent against the petitioner dismissing the complaint.

ARGUMENT

No substantial federal question is presented by the petition.

(1)

Earlier New York decisions held that the estate of a deceased City employee cannot recover cash payment for unused vacation days. *Simson* v. *City of New York*, 151

N. Y. Supp. 2d 218 (App. Term, 1st Dept. 1956), not officially reported. The Court relied for its decision on *Zichello* v. *City of New York*, 129 N.Y.L.J. 1030, March 27, 1953 (App. Term, 1st Dept.); *Nolan* v. *State*, 44 N. Y. Supp. 2d 328 (1943), not officially reported; and *Nicholson* v. *Amay*, 7 Cal. App. 2d 290, 45 P. 2d 697 (1935). All of the aforementioned cases hold that when the employer-employee relationship has terminated, the employee or his representative has no claim to unused vacation time. If such vacation time has not been taken by the employee, it is deemed to have been waived. If a contrary decision had been reached in these cases, it would have the effect of increasing the employee's salary beyond the amount fixed by law by paying him twice for days worked.

Similarly, in *Ricker* v. *Board of Education of the City of New York*, 196 N. Y. Supp. 2d 17 (1959), not officially reported, the Court held that an employee of the Board of Education cannot demand to be paid for unused vacation time after he resigns his employment. Once the relationship of employer-employee has been broken by reason of resignation or separation from service, the employee has lost his right to the claim of vacation with pay.

Even in the absence of the aforementioned cases, plaintiff would be barred by Article VIII, Section 1, of the New York State Constitution which provides that "No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual . . .". Opinions of the State Comptroller have held that payment of money to an estate in lieu of an employee's unused vacation would be a gift of public funds in violation of Article VIII, Section 1 (6 Op. State Compt. 50 [1950]; 2 Op. State Compt. 330 [1946]).

The decisions of the Commissioner of Education of the State of New York have also held that a teacher cannot be paid cash in lieu of vaction time if he terminates service before the time specified for such vacation, since such payment would be volative of Article VIII, Section

1 (*Matter of Appeal of Eleanor B. Marheim*, 72 St. Dept. (Educ.) 128 [1952]; *Matter of Sedelle Shepard*, 72 St. Dept. (Educ.) 134 [1952]).

(2)

The petitioner sought to avoid the effect of the earlier decisions and claimed payment under the Career and Salary Plan, which governed decedent's employment by the City of New York.

The New York courts construed the Career and Salary Plan as not providing for any monetary payment in lieu of vacation time. In dismissing the complaint, the Civil Court stated in part:

> "Plaintiff, the administrator of the estate of a deceased city employee, moves for summary judgment in an action seeking to recover the dollar value of 54 days of unused annual leave allowance to which deceased would have been entitled had he not passed away. Recovery is predicated on an express contract said to be found in the Career and Salary Plan and the regulations promulgated thereunder and an implied contract under regulations in effect prior to the adoption of the plan. The right to annual leave is claimed to be a vested one and not a gratuity. Under the law it is contemplated that the leave must be taken during the period of employment. The employee had the right to leave and regular wages for that period even though he did not work. The manner of termination of employment is not of controlling significance. The deceased could not have demanded salary in lieu of the annual leave and there is no showing of any provision for payment of moneys in lieu of annual leave existing up to the time of decedent's death and the administrator could acquire no greater rights than the decedent possessed."

In this application, the petitioner is of course bound by such construction of the New York law.

The claim of violation of a federal right must rest on the contention that it is unconstitutional for New York City not to provide for the payment of cash to its employees in lieu of unused vacation time. No case cited by the petitioner stands for that proposition. *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131 (1885); *Thomas* v. *Hoss*, 143 Oregon 41, 21 P. 2d 234 (1933); and *Robertson* v. *Miller*, 276 U. S. 174 (1927); are cited for the proposition that vacation pay, once earned and accrued, is a vested right. These cases do not so hold. All of them involved an employee's right to salary which had been withheld. We agree that if petitioner were claiming salary which decedent had earned but had not been paid, the City would be under obligation to pay such salary. But vacation time is not in the same category as salary. It is a personal privilege which dies with the employee. At any time during his employment, decedent could have applied for vacation time off, in which case he would have been paid while not reporting for work. But he alone had the power to take advantage of this leave, and even he could not have requested to be paid additional compensation in lieu of time off. Certainly, then, his administrator has no greater right than decedent had himself.

In *Ramey* v. *State*, 296 Mich. 449, 296 N. W. 323 (1954), the Supreme Court of Michigan did decide that the employees involved had a vested right to compensation for unused vacation after they had been discharged. But the reason for this decision was that the rules of the Civil Service Commission specifically stated that an employee was entitled to such unused vacation compensation at the time his employment terminated. Such civil service rule does not exist in the City of New York. Explaining the reason for its decision, the Court in the *Ramey* case distinguished *Boisall* v. *Case*, 172 Wash. 243, 19 P. 2d 927 (1933), by saying (296 N. W. at pp. 325-326):

> "This case (*Boisall, supra*) is not a parallel case with the one at bar. In that case there was no provi-

sion that if the employee was discharged he would be entitled to pay for any unused portion of his annual leave allowance. In the case at bar there is such a provision."

Other cases cited in the petitioner's brief do not relate to public employees but deal with the construction of private contracts containing provisions for vacation. Thus, *United States* v. *Munro-Van Helms Company, Inc.*, 243 F. 2d 10 (5th Circ., 1957), dealt with the question of whether the right to vacation pay, provided for in the particular contract involved, was to be regarded as wages and thus entitled to a priority in a bankruptcy proceeding. *General Tire and Rubber Co.* v. *Local No. 512*, 191 F. Supp. 911 (D. C. Rhode Island, 1961), aff'd 294 F. 2d 957 (1st Circ., 1961), dealt with the question of whether vacation pay claims came within the scope of an arbitration agreement. These questions turn on the construction of the particular contract involved and no purpose would be served by analyzing in detail each of the cases cited in petitioner's brief. The salient fact is that New York City does not have any provision for cash payments to employes in lieu of vacation time. Since there is no constitutional right to a vacation, it cannot be validly urged that the failure to provide for pay in lieu of vacation violates any federal constitutional right.

CONCLUSION

The petition for certiorari should be denied.

May 13, 1964.

Respectfully submitted,

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SEYMOUR B. QUEL,
Of Counsel.